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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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JOSEPH EBIN, ET AL.,

Plaintiffs,

v. 14 CV 1324 (JSR)

KANGADIS FAMILY MANAGEMENT, ET AL.,

Defendants.

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New York, N.Y.
September 11, 2014
10:40 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

BURSOR & FISHER P.A.
Attorneys for Plaintiffs
BY: SCOTT A. BURSOR
JOSEPH MARCHESE

KLESTADT & WINTERS LLP
Attorneys for Defendants
BY: JOHN JURELLER
LAUREN C. KISS

THE DEPUTY CLERK: This is Ebin & Jenkins versus the Kangadis Family Management, Docket No. 14 CV 1324. Will everyone be seated and will the parties please identify themselves for the record.

MR. BURSOR: Good morning, your Honor. Scott Bursor for the plaintiffs.

THE COURT: Good morning.

MR. MARCHESE: Good morning, everyone. Joseph Marchese for the plaintiffs.

MR. JURELLER: Good morning, your Honor. John Jureller from Klestadt & Winters on behalf of the defendants.

THE COURT: Good morning.

MS. KISS: Good morning, your Honor. Lauren Kiss from Klestadt & Winters on behalf of the defendants.

THE COURT: Thank you for putting up with my scheduling difficulties, but I think it's all for the best because I have now an uninterrupted two hours, and that will give us plenty of time to discuss any interesting issues.

Let's start with the motion to dismiss, and let me hear from moving counsel.

MR. JURELLER: Thank you, your Honor. Again, John Jureller on behalf of the defendants. This is the defendant's motion to dismiss what we have been calling the second complaint in this matter. Everything has been, obviously, laid out for you in the papers. Essentially there are four

arguments that we have asserted with subarguments but four main arguments, one being law of the case, one being the bankruptcy court decision dated July, I think, 28th, 2014, one being the complaint's failure to state causes of action against the two individuals on the alleged or purported direct claims, and then the remaining argument is that the bankruptcy court is the proper forum.

I'll get into each of those. Defendants' basic argument here is, your Honor, you already decided the motion to dismiss against the KFI or Kangadis Food, which we have been referring to as KFI, as the underlying company, you've already decided that, therefore you should decide this because they're the same claims. But these are not the same claims; these are claims against the individuals in their capacities as either members or officers or directors of the company or, in the case of Kangadis Food Management --

THE COURT: Yes, I've read it. It's not the same motion.

MR. JURELLER: Not the same?

I want to point that out. These are veil-piercing claims, purported direct claims which we believe are veil-piercing claims as well.

The entire premise of this case is, KFI's, the corporation's, alleged misbranding its sale of olive pomace oil as Capatriti 100 Percent Olive Oil. I think after we get

through these arguments, your Honor, I believe you will find that the complaint fails to state a cause of action and should be dismissed.

One other thing I want to note before we get into the different arguments in detail is that all discovery on this matter, with the exception of very limited discovery for the defendants on these supplemental claims, all discovery has been complete pursuant to your directive at the last conferences, and it was complete at the time that this second complaint was filed. So all the information that was available was out there and available to the plaintiffs when they filed this complaint, and I think that's important to note from the outset.

Starting on the arguments, the first argument, your Honor, is the law-of-the-case argument. Basically, this Court has already seen this issue and decided this issue on two occasions. In the KFI case, the prior case against the corporation, which was stayed through the bankruptcy, the plaintiffs attempted to add the four parties that we have here and four defendants --

THE COURT: Yes, and I said hold off because it may be mooted. And that was in the context of that case going to trial and I didn't want to delay that trial. But, of course, then the defendants put the company into bankruptcy. So I don't see that being law of the case at all. And of course law of the case, in any event, doesn't bind this Court because I'm

always free to change my mind. But in any event, I do not see that as being law of the case.

MR. JURELLER: OK. On June 10th, in your order of June 10th -- well, backing up, there was a second order, on April 18th, and what you stated in that order -- this was now a new case being brought against these same defendants -- you stated that this action was dismissed, you closed the case, without prejudice to be refiled if appropriate upon resolution of the related case against the company. And the reason why -- if I may?

THE COURT: Go ahead.

MR. JURELLER: The reason I bring that up, your Honor, is because what the decisions were -- and there was no basis, no full memorandum that was written by the Court, but what the decisions were -- they followed New York law -- under New York law, with respect to piercing-a-veil claim, it is incumbent upon having, number one, the corporation in the case and finding a liability against the corporation --

THE COURT: Well, if you're right about New York law and you have your separate veil-piercing argument, which we're going to turn to, I think, momentarily --

MR. JURELLER: Right.

THE COURT: -- but to the extent you're making an argument that this was a determination of that issue, I respectfully disagree. I've consulted with the judge who made

that decision, namely me, and he tells me that that was not his decision.

So we need to move on from the law-of-the-case argument.

MR. JURELLER: OK.

And just one other point on your June 10th order, where you allowed the claim to be filed -- and I am not going to harp on this -- you did acknowledge in that order that these claims were derivative of the claims against the company but circumstances have changed. And the reason I bring that up is that leads to the next point on this issue, is that circumstances really have not changed.

At the time, the bankruptcy had just been filed. When the Court had indicated that the circumstances had changed, it didn't indicate what it was -- we assumed it was the bankruptcy's filing changes the circumstances. However, now that everything has now sort of played itself out, we have the bankruptcy which is moving along, we have a plan of reorganization in place. The bankruptcy was filed, and acknowledged it was filed, because of potential liability related to this case, so we don't have a company that's gone out of business. The plan, as filed with its disclosure statement, will have a distribution to creditors, including if the class claim is allowed, to creditors in the class.

So that's one point that has brought the case back

to -- the circumstances really haven't changed here, because we have a corporation that's going through the bankruptcy process.

THE COURT: No, I think you're missing the central point. There is a public interest, a strong public interest, in moving litigation along. I think it's well recognized that perhaps the single greatest flaw of the Anglo-American legal system, as practiced in the United States in the 20th and 21st Centuries, is the extensive delay. And this Court, therefore, has sought, within the requirements of law, to bring to a resolution, through trial or otherwise, the factual issues, the determination of what the truth is in this situation, so that the parties can know it and so that the public can know it.

I have no idea of what motivated the going into bankruptcy, and I am pleased to hear that it's moving along, but that cannot be the tail that wags the dog. If there is, and we're going to hear more arguments on whether there is, but if there is a viable case against these defendants, and given that, as you correctly point out, discovery with very limited exceptions has long since been concluded, the matter ought to be brought to a prompt resolution and not delayed further because of whatever is going on in another proceeding in another court.

So I'm happy to hear you tell me what's going on in the bankruptcy court -- I'm always happy to get updates about that -- but we have a lawsuit unless it is not a lawsuit

because it should be dismissed but we otherwise have a lawsuit, the lawsuit is ready to be brought to trial, it will be brought to trial on, I think the date is November 3rd, if I'm remembering correctly. Long experience suggests that what's going on in the bankruptcy court will not move at anything like that rapidity.

But go ahead.

MR. JURELLER: Your Honor, understood. What I am setting up for you, just because there's so much in this case, is sort of the foundation of the argument that we're going to present to you here. We have a bankruptcy which is moving along, and, again, as a status update, that's what's happening.

We also have a situation where the class plaintiffs have now filed a proof of claim for 260-million-odd dollars in the bankruptcy court, and where this goes with respect to this entire --

THE COURT: How could they not? That's the parallel to the action that's been stayed, correct?

MR. JURELLER: Understood. And with respect to the piercing the veil, under New York law, there is no separate cause of action --

THE COURT: But that's where I think you're in stronger ground. So I think we really ought to turn to that and forget law of the case.

MR. JURELLER: That's fine, your Honor.

Moving on to that point, under New York law, the law does not recognize a separate cause of action for a piercing of the veil. A claim for piercing the veil against an officer, director, member, principal presupposes a liability on the corporation itself. The cases that have been cited indicate that you must have the corporation -- if you look at all the cases cited by all the parties, the corporation is an integral part of that because it assumes the liability, basically you are imputing the liability onto the --

THE COURT: I am, at first blush, persuaded that that is a correct reading of New York law. So I think you can assume on that argument that at the moment I'm in agreement with you, but I of course want to hear from your adversary. But you can move on, not because, as in the first instance, I'm unpersuaded but, rather, in this instance, as to the argument you're now making, I am persuaded.

MR. JURELLER: And I appreciate that. Thank you for telling me that.

Even assuming -- and I'm not sure what counsel is going to say -- that you could bring a piercing-the-veil claim without having the corporation -- which New York law is pretty clear on, I think it's pretty established -- as you said, there are actually no allegations, in the complaint anyhow, that meet the level of piercing the veil.

First of all -- and I think this is very important --

at this date there's really no allegations against Ms. Mahi Andromahi Kangadis -- we have been calling her Mrs. Mahi, that's how she's been defined, who's one of the members -- there's no allegations in the complaint, period, other than she's a member.

Second, there's no allegation again Kangadis Family Management, KFM, at all other than that there is a similar ownership structure -- Kangadis Family Management owns solely the real property where this operation is based -- and there's no allegation of commingling, there's no allegations of anything as to this single-purpose entity having anything to do with KFI, other than owning the real property, nothing is alleged. And I think that's very important to state as well.

With respect to the other allegations for piercing the veil, the only thing that's alleged is that one of the members took distributions from the company. There's no allegations that these distributions were improper, there's no allegations that these distributions were not correctly documented, and there's no allegations of anything improper with respect to this in the complaint at all. And that's as to Mr. Themis Kangadis.

As to Mr. Aris Kangadis, there's no allegations of any commingling of any distributions of anything, period, with respect to him. So even if the Court were to look at the piercing-the-veil claims, which, again, we believe don't stand

on their own, but even if the Court were to look at it, there's nothing in the complaint at all that even gets close to the burden of piercing the corporate veil.

Oh, the other point that was brought up is that there was no shareholder/stockholder meetings on a regular basis. This is a closely-held company, owned by a father, mother and son -- the son operates the operations -- and that in itself is not sufficient to get past it.

So with respect to piercing the veil, we believe all the claims, number one, can't be run on their own; number two, the burden is not met in the complaint itself. There's nothing, there's no plausible way the Court could see this company as being a sham set up solely for these operations. It's been operating for years, it has other products, and there's nothing in here that even meets the burden of showing that allegation that's set forth in the complaint.

Next argument that we have with respect to the piercing-the-veil claims, your Honor, putting that which we just argued aside, is, it's our understanding that the bankruptcy court, in their order of July 28th, 2014, has already indicated quite clearly that piercing-the-veil claims are stayed by the automatic stay.

THE COURT: Of course I don't have to reach that issue if I agree with the argument you've just made a minute ago, but I'm not so sure that's right. The Court, the bankruptcy court,

Judge Grossman, said -- this is from the end of his opinion -- "The class action complaint contains allegations that the principals harmed the class action plaintiffs based on their own conduct. While piercing the corporate veil seems a necessary component of finding liability against the individual insiders, the class action plaintiffs claim that this is not the case. This will be their burden to prove before Judge Rakoff at the trial scheduled for November 2014. To the extent their claims rely on piercing the corporate veil of the debtor, the class action plaintiffs are aware of the consequences, as they appear to have read, and to have cited to, this Court's In Re Pitts decision in their brief."

Now, I'm not quite sure what Judge Grossman meant by that, but I went back and looked at Judge Grossman's decision in Pitts -- which of course is not binding on this Court in any event but I certainly look at it for its persuasive authority -- and that was the reverse situation. It doesn't seem to have been this situation at all.

The discussion in Pitts, the more general discussion, also turned predominantly on a discussion of a Fourth Circuit case, again not binding on this Court but certainly something I need to look at, A.H. Robins Company versus Piccinin, 788 F.2d 994, (4th Cir. 1986), which began by stating the general rule that the automatic stay does not apply to nondebtors but then stated an exception to that rule specifically, as Judge

Grossman says in Pitts, "In A.H. Robins, the Court of Appeals from the Fourth Circuit found that in unusual circumstances the automatic stay can be extended to actions against nondebtors." He then goes on to discuss the facts of A.H. Robins, which are very different from the case here.

And then, finally, he makes reference to a Second Circuit case, which of course is binding on this Court, and is that is in the case of Queenie Ltd. versus Nygard International, 321 F.3d 282 (2d Cir. 2003), where, as Judge Grossman says, the Court of Appeals for the Second Circuit concluded that the automatic stay applied to an action commenced against inter alia a nondebtor corporation, which was wholly owned by an individual Chapter 11 debtor, again, the reverse of the situation here.

So I see nothing in what he said, either in the one snippet from his decision in the bankruptcy here that you cite or in the authority that he is citing, that suggests that he made a determination, which in any case would not be binding on this Court, that the plaintiffs were precluded under, apparently, threat of being accused of violating the automatic stay, of bringing veil-piercing and alter ego claims against the individuals.

Now, that is totally separate and apart from the earlier argument you made, which I've already indicated I'm tentatively leading towards adopting, which says New York law

would not permit those claims to be brought in this situation. But I really don't see that you can read as much as you apparently are reading into that one sentence of Judge Grossman's decision.

MR. JURELLER: As you said, your Honor, this is an alternative argument that we had which supplements our previous argument that piercing the veil is -- quite clearly cannot clearly brought in New York. The reason we read this a little differently and why we read this as being applicable is: Number one, what the judge does is he separates, in our opinion, the direct claims against the individuals and the derivative claims. And the way we read Pitts, understanding the two cases that you brought up as well, which allows the state to be applied to nondebtors in certain exceptional circumstances, but the way we read Pitts is that the derivative claim has an effect on -- whether it's individual corporation, corporation/individual, obviously it's the opposite in our case right now, but if the derivative claim is going to have an effect on the debtor, so, again --

THE COURT: Well, I agree with you that the question of effect is part of what's involved, and you have to distinguish there between necessary effect and potential effect. A case that neither side cited but I think is relevant is the Second Circuit's recent affirmance of Judge Marrero and me in one of the Madoff cases. And the issue there that would

involve different provisions of the bankruptcy code, the claim was made by the Madoff trustee that the automatic stay prevented claims being brought by New York State and others and a settlement that was ultimately made in those cases because the depletion of the feeder funds' assets to pay the settlements would make less available for the claims that the trustee had brought in bankruptcy against the feeder funds. And the Second Circuit rejected that argument, saying our precedent shows that where the claim against the third party will necessarily affect the capacity of that same third party to make a payment in the bankruptcy court, the stay will apply, but where it's just a possibility, a factual possibility but not a legal necessity, then the stay will not apply.

I think that's very roughly analogous here. Any judgment that might be rendered against the individuals in this lawsuit might, although it seems to me doubtful, affect the ability of the corporation to pay in bankruptcy, though that's extremely unlikely but it's only possible it would be if the alter ego claims were established in the bankruptcy court. So, otherwise, limited liability would obviously say that the owners can't be liable for the debts of the corporation or the liabilities of the corporation.

So if a judgment is rendered in this case against the individuals, it would only impact the ability of the corporation in bankruptcy to pay any judgments that might be

rendered against it if the corporation was otherwise not able to pay those liabilities, if, after a determination that probably will never be made in the bankruptcy court, alter ego or veil-piercing was established, et cetera, et cetera, et cetera.

So I do not see these cases as precluding the action here or affected by the automatic stay.

MR. JURELLER: If I may just add one point to that, your Honor?

THE COURT: Sure.

MR. JURELLER: And then we'll move on. I don't want to beat up this point.

I think the way we saw it -- and we understand that point about being able to pay or not pay and necessity versus potential down the road, but what I think the Court was getting at here, because it was speaking directly about these piercing-the-veil claims, these alter ego claims, is that you're bringing in a claim against officers in this case, officers/directors, outside of the bankruptcy, now those claims, because of New York law, presuppose the liability of the corporation itself, so really --

THE COURT: That's really your first argument. And as I say, I certainly want to hear from your adversary, but that argument seems to me to have a lot of weight. It's an interesting argument, this backup argument, this fallback

argument, but it may be the Court will not have to reach it in any event.

MR. JURELLER: Let me segue into the next argument. How about that?

THE COURT: OK.

MR. JURELLER: The way the complaint has been pled, each of the six causes of action -- express warranty, breach of implied warranty, New Jersey Consumer Fraud Act, the General Business Law under New York, fraud and negligent misrepresentation -- six causes of action were brought against all four of the individuals under the piercing-the-veil claim. We've just discussed that. Putting that aside now for the time being.

THE COURT: Now we're talking what's against the individuals?

MR. JURELLER: Right. Without any distinction, the claims have now been brought as well against Themis Kangadis, Themis and Mr. Aris Kangadis, Mr. Aris for direct --

THE COURT: Forgive me. My law clerk says that she thinks -- and you have to understand the hierarchy of chambers, I'm merely her vessel carrying out her wishes in all respects -- she thinks that it would make more sense to hear from the plaintiffs on this veil-piercing stuff before we move on to the direct claims. That sounds right to me too, so let's hear from them and then we'll come back to you in a minute.

MR. JURELLER: Thank you, your Honor.

MR. BURSOR: Thank you, your Honor.

The question that the Court seems to be focused in on is whether there's a requirement under New York law to have a judgment against the corporate entity as a precondition to piercing the veil and attaching liability --

THE COURT: Yes, or the functional equivalent thereof.

MR. BURSOR: So we cited two case cases from the Southern District of New York, Variable Parameter and its --

THE COURT: Yes, so let's talk about that. Hold on just a minute.

Variable Parameter is California law, is it not?

MR. BURSOR: That was Judge Chin --

THE COURT: Is it not his application of California law?

MR. BURSOR: Yes. It was Judge Chin.

THE COURT: So what does it have to do with this case? Their argument is under New York law.

MR. BURSOR: I understand that, your Honor, and I don't believe there's a distinction between California and New York law on this point.

THE COURT: Well, that's not self-evident to me.

MR. BURSOR: I agree that is not self-evident, and I'd like to --

THE COURT: The other case you also cited, a Second

Circuit case, which was St. Paul Fire & Marine versus PepsiCo, which is about Ohio law. Being perfectly frank, I was a little disappointed that you did not come to grips in your brief with the fact that both of the cases that you are relying on deal with the law of other states. Anyone who has looked remotely into the body of law regarding alter ego and veil-piercing knows that there is considerable differences between states, sometimes radical differences, between states as to what is required and what the law is in those areas.

So one cannot make the leap that because a court says something is the law of Ohio or California, that it's the law of New York.

MR. BURSOR: Your Honor, we also cited the Levesque v. Kelly case. It was a Southern District of New York case. It's cited on page 4 of our opposition brief of the motion to dismiss. And --

THE COURT: I haven't taken a look at that, but let me see. That was New York law?

MR. BURSOR: Your Honor, I'm just looking at the parenthetical in my brief, and it does not indicate which state's law it was. But I want to make a few points with this, and we should take a look at the Levesque case and check it.

THE COURT: Well, I'll have my law clerk do that now.

MR. BURSOR: So, your Honor, the critical point, I think, is that we did not see any case from New York that says

you cannot proceed with a veil-piercing claim against a shareholder of --

THE COURT: Well, there's a decision that your adversary cites that says that veil-piercing is an equitable remedy that "assumes that the corporation itself is liable," and then imposes the corporation's obligations on its owners or alter egos.

So that seems, while it's not exactly a holding, it seems to be an assertion by the highest court of New York that these are in effect derivative implications. As a logical matter, given New York's long, long history of, in the corporate law area, taking a very conservative common-law type of approach -- not at all like California, for example -- if you look at the corporate law of California, as a general matter, it could not be more different from New York, which may account for the fact that there are many more corporations who are incorporated in New York than in California. The closest analogy to New York law would be Delaware law.

But given that, I think the assertion that I just read from the Morris case is interesting, the citation, for our court reporter's benefit, is Morris versus New York State Department of Taxation and Finance, 82 N.Y.2d 135, 1993.

There's also cited by your adversary the Second Department's decision, New York State Second Department's decision, in Hart v. Jassem, 43rd A.D.3d 997, that, New York

"does not recognize a separate cause of action to pierce the corporate veil."

Now, I concede that those cases, if you look at them, are not absolutely dispositive of the issue, but in the absence of anything to the contrary in New York law, they are, at the very minimum, suggestive, are they not?

MR. BURSOR: No, your Honor, I don't think they are. And I'd like to address each of those cases and also the two that we cited.

Let me say that I think there is more than one type of veil-piercing claim. There are veil-piercing claims, for example, of the type that the New York Court of Appeals was discussing in Morris, where a creditor comes in and says, the corporation has some obligation and we want to impose that obligation on you. I think that is one type of veil-piercing claim.

I think the veil-piercing claim that we have here is quite different from that type of claim because the allegation in this lawsuit, your Honor, is that the shareholders of these two corporations, KFI and KFM, created those corporations for an illegal purpose -- that's an allegation that's in our complaint -- the illegal purpose of selling adulterated and misbranded oils. And the shareholders in the allegations here are attempting to use the corporation to perpetrate a fraud and to shield themselves from a fraud.

So the Morris case was a scenario -- and I don't have the facts at hand but I've --

THE COURT: What is your evidence -- we are of course on a motion to dismiss, not on summary judgment but discovery is completed -- what is your evidence that the reason they created the corporation was for an illegal purpose, as opposed to saying that the corporation undertook to advertise their goods or whatever, engaged in fraudulent misrepresentations?

MR. BURSOR: Well, I'd like to break the answer to that question down in two parts. The first part is, we've alleged it in the complaint -- and this is a motion to dismiss so our allegations --

THE COURT: That's true, but we're going to be talking before today is over about summary judgment so we might as well find out whether there is any evidence out there.

MR. BURSOR: So, your Honor, the evidence to support that allegation is, we have very detailed allegations in the complaint -- and when I say allegations, they're supported by citations to depositions and the like but they're allegations -- that this company has for a period of more than seven years committed millions of acts of misbranding, not only to Capatriti 100 Percent Pure Olive Oil but other brands of olive oil, for example, the Porto extra virgin oil.

THE COURT: But the argument you're making, if I understood it, is that the reason this veil-piercing claim is

different from the more traditional veil-piercing claim is, in the traditional veil-piercing claim a company that does something wrong, if found liable, its liabilities can then be imputed to the owners if they requirements of alter ego or veil-piercing are met.

You're saying those cases are distinguishable because here the corporation was created ab initio, the two corporations were created ab initio, for the purpose of concealing or aiding or carrying out the fraudulent scheme. And I am still not hearing any evidence of that.

MR. BURSOR: Well, our position is a little bit different than that, your Honor.

THE COURT: OK.

MR. BURSOR: We allege the corporations were created for this purpose, but also we allege they were used for this purpose, and that the corporations were used to conceal --

THE COURT: But if that's the distinction, then it's a distinction without a difference, because an alter ego or veil-piercing allegation normally assumes complete control over the corporation. So in any case in which a corporation committed a tort, the claim could be made that it was really being used as a screen to screen the ownerships from liability. That's why you have the veil-piercing doctrine or the alter ego doctrine -- that's among other reasons -- but that does not distinguish the cases that your adversary is relying on.

MR. BURSOR: Well, not all veil-piercing cases are going to be tort cases, your Honor.

THE COURT: That's true.

MR. BURSOR: And that's why I was trying to describe the distinction between --

THE COURT: This doctrine doesn't apply to tort cases generally?

MR. BURSOR: No, what I think is that veil-piercing -- it's not a legal doctrine, it's an equitable doctrine, it's used in equity as a way to avoid having the corporate form used to facilitate fraud.

THE COURT: By the way, just while I'm thinking about it, to the extent your claims are veil-piercing claims, they would be for the Court, not the jury?

MR. BURSOR: Actually, that's not correct, your Honor. We took a look at this -- and I don't have the research at hand. I know in California, because I've tried veil-piercing cases in California, that's correct. In I think the Second Circuit, I think the law is that veil-piercing claims go to the jury at least for factual findings.

So the law is a little bit all over the place on this, and I am sure that's something we will address before November 3rd, as to whether those are tried to the jury.

THE COURT: Would it be a question of federal law or a question of New York State law?

MR. BURSOR: I don't know the answer to that right now, I don't know the answer to that. That's something that we can certainly address.

But, your Honor, I think the second point I want to make about veil-piercing, and why I think the Variable Parameter and the Levesque cases, whether they were applying California law or another body of law than New York law, why I think they're particularly persuasive here is, the procedural setting was identical, because you had veil-piercing claims against the shareholder and claims against the corporation going forward at the same time.

And there are many cases in New York law where you have -- in fact, a couple of the cases that the defendants cite, Hart v. Jassem and Rotella, you have the same scenario you have the claim against the corporation going forward at the same time as the veil-piercing claim.

Now, it were true that New York law has this hard-and-fast rule that the Morris case doesn't say and no other New York case says, but if it were true that there's this rule that you need an obligation of the corporation before you can seek to pierce the veil, then you could never have those claims litigated together because the veil-piercing claim would be subject to dismissal because the plaintiff would be unable to plead an obligation of the corporation as a prerequisite to piercing the veil at the time, at the same time, prior to

having the resolution of the corporation's obligations adopted.

But I think the most important point, your Honor, the most important point is that if that were the rule, if that were the rule, it would open up a pretty significant loophole for the perpetrators of fraud to use to try to shield themselves, because what they could do, they could do what the Kangadis company did here to give themselves blanket immunity. They could say, we're going to use the corporation to perpetrate a fraud, when we get sued we're going to put the corporation into bankruptcy, and the bankruptcy will shield us from any alter ego liability as well, because we all know there's very unlikely to be any resolution of the bankruptcy that results in a finding against the corporation. And if there is some payment from the bankrupt entity as a result of the reorganization, it's going to be greatly diminished because the bankruptcy court, of course, is a court of equity, the claims get reduced, you know, we're very likely to get crammed down in the bankruptcy. So you would have a scenario --

THE COURT: Well, I understand that is a possible practical implication, but it's one brought about by bankruptcy practice. This is a question of New York law. New York law almost never considers bankruptcy practice because there is no state bankruptcy.

MR. BURSOR: Correct.

THE COURT: So what you are asking me to do, in

effect, is say I should read New York law differently from how it might otherwise be read because of the implications or the loophole it could create given federal bankruptcy, not law, but federal bankruptcy practice.

It's hard to believe that that would have been in any way, shape or form in the minds of the New York courts when they addressed this issue; and, therefore, I'm not sure that I can consider it.

MR. BURSOR: That's not what I am arguing, your Honor.

THE COURT: OK.

MR. BURSOR: I'm arguing that New York law is not, as Mr. Jureller described it, New York law is not -- the dictum that has been pulled from the Morris case is not a statement of the point of New York law that Mr. Jureller has asserted it is. The dictum from the Morris case deals with a different type of veil-piercing claim. And the Morris case was not dealing with the scenario where you have a claim against the corporation that is unresolved and unlikely to be resolved at the same time there are veil-piercing claims being brought.

Now, the case that does address that, the New York case that does address precisely that scenario, is the Hart case, which Mr. Jureller cited. And the Hart case is like this case, it's like this case was before there was a bankruptcy filed, because in the Hart case there was a pleading that said, plaintiff said, we have claims against this corporation and we

want to pierce the veil and get at the shareholders.

Now, the shareholders moved to dismiss. And what the Hart case said, the part that Mr. Jureller cites from Hart is, the Hart case says there's no separate cause of action in New York law to pierce the veil. Of course that's correct, but that has nothing to do with this case.

So the part of the Hart case that does have something to do with this case is the Hart case's denial of the motion to dismiss with respect to the veil-piercing claims against the shareholders at a time when the liability of the corporation had yet to be determined.

So when Mr. Jureller cites the Morris case --

THE COURT: All right, that's a fair part. I want to go back and, actually, I think -- first of all, let me find out from my law clerk, the other case you cite, Levesque, whatever the name was, what state's law that is.

THE LAW CLERK: I don't actually think it's directly on point. It is New York law but it's a particular instance in which his --

THE COURT: All right, so Judge Jing has ruled it's not on point but that it is New York law. I'll take a look at it, however.

But I think your point about Hart does give me some pause. I do want to go back and look at Hart.

MR. BURSOR: And, your Honor, if I may, on Levesque,

when you do go back and take a look at Levesque, the reason we cited it and that we think it's on point is because if you look carefully at Levesque, it was a case where the corporate entity had filed a bankruptcy and there were veil-piercing claims that were continuing in the Southern District against the shareholders. And the shareholders made a motion for summary judgment, and that motion was denied.

And I believe there's a statement -- I'm a little hazy but I believe there's a statement, the trial will go forward. It was summary judgment denied, and the judge made a statement something like, the trial will go forward but summary judgment denied --

THE COURT: Probably not the most elaborate discussion of your point, in any event, and this is a case, again, that is not binding on me, although of course I'm going to look at it.

The case that is in some sense binding on me is Hart, so I do want to go back and look at Hart. The rule, of course, is I have to -- unless I determine that Morris has settled the issue, I then have to figure out what the New York Court of Appeals would hold, and I look then and give considerable weight to what the lower New York courts have determined. That that's why Hart is very important.

MR. BURSOR: Right. And, your Honor, I just want to be completely fair on this point. I don't believe Hart was dealing with a bankruptcy situation, it was dealing with a

situation where the claims were pled together and just the claim against the corporation had yet to be resolved.

THE COURT: All right. Let's go back to your adversary for rebuttal on this point and then we will move on to other points.

MR. JURELLER: Sure, your Honor. And I think you got it the first time with the way that New York law is set up. You need to have -- the whole idea behind this is, the corporate liability is imposed on the members, principal shareholders, officers, directors, you have to have corporate liability, you can't have a shareholder who's liable and not the company, whether they're brought together, whether they're brought separate. You always have to have the company involved. And I think if you look at every case that's involved, the corporation is part of that case.

With respect to the cases that were cited by the plaintiffs, interesting -- putting aside the fact that they're not New York law except for Levesque, one of the interesting parts of that is that there also is judgment against the companies.

THE COURT: I guess their argument -- forgive me for interrupting, and then I want to have you continue about Levesque, but as I understood the argument -- and this was not the entirety of their argument but part of it -- it is -- OK, what's the purpose of a corporation? It is, among other

things, to limit your liability. But the common law and the law of every jurisdiction has long since recognized that that can't be a way to avoid liability for acts that are essentially the acts of individuals that are simply operating under a corporate front, for lack of a better word; and therefore you have alter ego and veil-piercing doctrines.

That varies considerably from state to state but there's no state that doesn't have some version of it. And I think the biggest difference, from my recollection of other cases I've had between the states, one that's not really relevant here, in some states you can have alter ego and veil-piercing regardless of whether a fraud is being used for a fraudulent purpose as long as domination and control are complete. In other states, even if domination and control are complete, you also have to have it being a fraudulent purpose being involved before you can have alter ego and veil-piercing liability. Here, of course, they're alleging fraudulent purpose.

So the argument goes, since the whole purpose of alter ego and veil-piercing is not to allow the corporate structure to be just simply a front for activities that for all practical purposes are being undertaken in your individual capacity, therefore, that would be undercut if you could, by taking the corporation into this front, into bankruptcy, then get a benefit that you otherwise would not have under state law

because of the automatic stay permissions, that the automatic stay permissions should apply in those situations because it's not really about the corporation at all, it's all about the acts of the individuals.

So I may be overstating it and it's certainly not the only argument they're making, but that, I think, is part of the argument they're making. So what about that?

MR. JURELLER: Let me address, your Honor, a couple of different points. First and foremost, when the Court looks at the complaint, the Court is going to see very, very clearly that piercing the veil has not been sufficiently pled. What's pled is not plausible. So that's point number one.

Point number two is, New York, law is extremely clear that you must have -- a piercing-the-veil liability presupposes liability against the corporation. It's clear, the cases that are cited by the plaintiffs are distinguishable in that there already is a judgment against the corporation, so now you can move on at that point.

If you look at Levesque, they already have a judgment against the corporation, so now they, despite the corporation's bankruptcy, they now can go forward because they have the judgment already, you now have the liability already in order to move to the shareholder. That's the distinction on all the cases that they cite.

With respect to the main point that your Honor just

made, filing bankruptcy, to my knowledge, does not give anybody who's committed a fraud an out. If there's a piercing-the-veil argument --

THE COURT: It can be litigated in the bankruptcy forum.

MR. JURELLER: You can litigate it in bankruptcy, after the bankruptcy, you can get your judgment in bankruptcy --

THE COURT: You're saying it doesn't extinguish any claim; and, related to that, we have been talking about creating loopholes, but all of these are exceptions to the basic policy, which is, we want individuals, for the good of the development of commercial activity, to be able to create limited liability corporations so that they don't have to fear that every act they take in their commercial activities will subject them to individual liability, because if that were the case, commercial activity would be a small fraction of what it is otherwise. So we shouldn't lose sight of the overall policy of having corporations to begin with.

MR. JURELLER: We all know New York has extremely strong corporation policy, so that's the point we have to make. And I think it's -- the Court looks at not only the pleadings but also the case law on New York. There's no rights that have been taken away with the bankruptcy, but there also is no right to bring the piercing the veil without the company first.

THE COURT: All right. Let's move on to the individual claims.

MR. JURELLER: Your Honor, with respect to the individual, as I was saying before we switched gears here, there are six claims that have been brought, putting the piercing the veil to the side, six claims that have been -- the so-called -- one of the direct claims that have been brought against Themis Kangadis and Aristidis Kangadis. We have been referring to Themis Kangadis' as Themis and Aris Kangadis as Mr. Aris, just so that our argument complies and follows the briefs.

THE COURT: Let me, to help you out again --

MR. JURELLER: Sure.

THE COURT: -- and of course you'll be given an opportunity to respond after we hear from your adversaries, but my preliminary take -- none of this is binding on me, none of this is law of the case, and I may change my mind tomorrow before I decide these motions -- my preliminary take was that the individual claims should be dismissed with respect to the claims under the express and implied warranty claims, Counts One and Two but should not be dismissed with respect to the claims for breach of New York -- was it general obligation law, whatever it is, Section 349 and the comparable New Jersey law as well as common law fraud and negligent misrepresentations. So, in other words, the way I was leaning was dismissing Counts

One and Two but not Three, four, Five and Six. But I'm perfectly open to being persuaded either way on any of that.

The point is, you may want to spend more time right now on Three, Four, Five and Six.

MR. JURELLER: Well, why don't I put One and Two aside, and I think those are pretty clear anyhow, and those would have been the quicker of the arguments. And I think even if they were -- their case law is that they're a piercing-the-veil case right now.

Going to the claim for violation of New York General Business Law 349, which is the deceptive practice law, again --

THE COURT: General Business Law, I think I said general obligation law, but General Business Law is correct.

MR. JURELLER: -- in order to allege a claim, in order to allege a claim under GBL 349, there must be an allegation pled that the defendants -- and in this case we're talking about Themis and Mr. Aris, the individuals -- made misstatements or made omissions as part of this deceptive practice.

What I want to first point out, again --

THE COURT: Forgive me for interrupting. In the complaint, at paragraphs roughly 58 through 70, there are allegations that the two individual defendants personally directed employees to put pomace oil in mislabeled tins, mislabeled as olive oil. So I think that is where they're

alleging arguably a violation of New York General Business Law Section 349.

MR. JURELLER: Right. The plaintiffs make very clear in their opposition that they have submitted 12 pages of supplemental facts, but as we say in our reply, it's not the volume here, it's the content that was put in there. Just because you say it's so, doesn't mean it's so. And if you look at those factual allegations or purported factual allegations that are put in here, none of them meet the standard required for cause of action Three, Four, Five or Six. We're going to -- maybe it's easy to talk about all -- at least talk about the facts.

Let me go through -- I think it helps to go through and shed some light on what's actually in here because there's a lot of pages but there's not a lot of content.

Talking first about -- now, remember, there must be an allegation of a misrepresentation or omission. Talking about Mr. Aris, Mr. Aris is the father who has -- and it's stated in the complaint -- retired in 2005. Essentially he goes to the premises and walks around, and he's there, you know, but he's the father, one of the members.

THE COURT: Well, wait a minute. I'm happy to discuss what the discovery shows or fails to show, but right now we are on a motion to dismiss. So let me get my law clerk to give me a copy of the complaint, and I want you to -- oh, sorry. Very

good.

MR. JURELLER: That was a little bit of background, your Honor. I'll stick to the facts that are pled in here.

THE COURT: Yes.

MR. JURELLER: Again, after discovery has been completed.

So with respect to Mr. Aris, what do we have in the complaint? We have allegations solely from a single employee, who was there for eight months, Ms. Maria Annetti. Ms. Marie Annetti, the entire complaint against Mr. Aris is based upon her testimony, Ms. Maria Annetti states she saw Mr. Aris walking around the production floor, that she saw him directing employees, that she saw him directing trucks come in and where to put stuff in tanks. That's what she said.

What she doesn't say is, when she saw him, how she saw him -- she says she saw him from her office -- she doesn't say where she heard, how she was able to see him, she doesn't say what was in the trucks, what was put into the tanks, how that fluid in the tanks, assuming it's fluid in the tanks, was used. Now, remember there's different products here. Whether that particular fluid was put into the tin, whether that tin was actually sold --

THE COURT: No, I don't think you need that.

MR. JURELLER: But I think you need some of that, your Honor. You need to show misstatements. You can't just show,

I'm sitting in my office and I'm watching someone on the floor doing this with their hands, without knowing what was said and what was going on. And it doesn't go that far. That's after --

THE COURT: I think you are confusing what's required in a complaint as to what's required on summary judgment. And, of course, you're going to tell me later, but you still have the opportunity to bring summary judgment, but more is required in pleadings than used to be in a case, before Iqbal and Twombly. It doesn't require that you set forth in the complaint the answer to every hypothetical objection that might be raised and the obvious implications of what you are alleging.

So in any complaint -- let's take it out of the context of the this particular case -- if any complaint said, I saw Joe direct John to do X, some improper thing, and you could have a long debate, which would be very appropriate for summary judgment or for the trial, about, well, what do you mean by you saw him? Did you hear him? Did you interpret? Was this a lay opinion under Rule 701 of the Federal Rules of Evidence? What led you to that conclusion? None of that is required in a complaint. That's the warp and woof of summary judgment.

So I don't --

MR. JURELLER: I understand that, your Honor. But taking your example of, I saw Joe direct X to do X, what we

have here in the complaint, we need more. Joe -- we have Mr. Aris directing some unnamed employee or some unnamed truck, nondescript truck, to do something with some nondescript olive oil or whatever product it was, but there's no connection.

Just because you allege that, I saw Mr. Aris point an employee to do something, you need more. There's other products -- there's other things going on here, and there's no details; again, it's just fluff at this point. And you need to have more, under these requirements -- probably especially when we get into the fraud and the negligent misrepresentation claims, it needs to be specific, you need to know what they did, what they said, at the very minimum, how it relates to this, not -- putting aside even that the requirements in the GBL, and the requirements under New Jersey too, require actual misstatements and omissions.

But by seeing somebody on the production floor point someone somewhere, without hearing it, without knowing what was being pointed to, it doesn't get us to the point that needs to be pled in the complaint. And that's the point that I was trying to make here. Yes, we don't need to have every single detail, and we're clear on that, but we need to have sufficient details. And this does not have sufficient details as it relates to Mr. Aris. All it says is, I saw him on the floor pointing somebody somewhere, I don't know what he was pointing to, I don't know what was said, I don't know what products were

even involved, and I don't know what was done with those products.

THE COURT: Well, this is all in the context of allegations that he is the current president and chief executive officer of KFI, that he is actively involved in the business, that he determines which suppliers KFI purchases from, that he determines which products KFI will accept from suppliers, that he works every day, that he has authority over the actions of the employees, that his office is on the production floor, that he would look at what was being packed, that he was, for a period of time in effect the production manager, that he was there from early morning until mid-afternoon. And then there is testimony like -- this page 21 of the complaint -- question:

"Q. Who was it that decided to put pomace oil in that tin and sell it as a hundred percent pure olive oil?

"A. I don't know who that would be, but the one who did it normally was Mr. Aris.

"Q. Mr. Aris was responsible for what was in the tin?

"A. Yes."

I'm just picking these out at random, virtually from page after page. So it's not simply the single item that you made reference to.

MR. JURELLER: Right, your Honor, it's relying on one individual, Ms. Maria Annetti, who was there for eight months

and apparently was --

THE COURT: Please tell me where the law in the United States says that a complaint can't be brought on the basis of the eyewitness testimony of a single individual.

MR. JURELLER: I'm not saying that. Let me continue on what I meant. What I tried to look at is, taking this all as a whole here, taking what is in the complaint, you know, we have to take it as being true just by the fact discovery has been done. What do we have? We have nondescript -- leading questions but nondescript answers as to someone doing something. We don't know when, where, what, how or -- it's, yes, well, I don't know who does it but I think he was one of the guys who did it, I don't know -- I think he was on --

THE COURT: Well, if this were a summary judgment motion or if you were to bring a summary judgment motion separate from a motion to dismiss, is it your contention that they have not supplied the details and answered the problems you're now raising and therefore you would be entitled to summary judgment, or is it your contention that they have answered those but they didn't put it in their complaint and therefore the complaint should be dismissed?

MR. JURELLER: Well, I think the question is both, your Honor, and I'll tell you why. With respect to this --

THE COURT: Well, because I have the total untrammeled discretion to convert this into a motion for summary judgment.

MR. JURELLER: What I am saying is, the complaint doesn't meet the burdens necessary to prove these four causes of action on behalf, that this individual -- and we're talking about Mr. Aris at this point -- this individual made misstatements that met GBL 349, met the New Jersey Consumer Fraud Act, met the fraud pleadings or the negligent misrepresentations. What they pled in there doesn't meet that.

On a summary judgment standpoint, clearly this doesn't meet that, in my opinion, because, again --

THE COURT: I understand that. My question is slightly different. Let's just make it clear, because what you are arguing in effect is, they had the benefit of virtually all discovery. So there was no excuse for their not putting it in the complaint everything that would be adequate to legally support their complaint against that motion to dismiss.

So, for example, this would not be a situation where I would give leave to replead as you might have in a motion brought before discovery, but the question I'm asking is: Assuming, for the sake of argument, I were to convert this into a summary judgment motion, at least this portion, in which case I'd give each side a chance to add some facts, if they had any facts that went beyond the complaint, are you saying that there are no facts out there, as far as you're aware, that would answer the problems you are now raising?

MR. JURELLER: I believe the answer to that is, yes,

your Honor. And I believe the fact that it wasn't put into the complaint in the first place is a reason --

THE COURT: All right. So why should we have this somewhat abstruse debate over whether this fairly detailed complaint is nevertheless insufficient? It's not like you're arguing some glaring oversight, like they failed to allege, if it were a diversity case, damages of 75,000 or separate citizenship, it's not that kind of argument. It's an argument about for nitty-gritty details. Why shouldn't we just convert it, that portion of the motion, into a summary judgment? If there's anything further they have for discovery, they can present it quite quickly. If there's anything further that you want to present for discovery, you can present it quite quickly and then I can decide a summary judgment.

Doesn't that make more sense?

MR. JURELLER: As a defendant, we're ready to move forward as quickly as we can. So we will certainly be open to that, your Honor.

THE COURT: I'll hear from the plaintiff.

MR. JURELLER: We do feel the plaintiff doesn't meet the --

THE COURT: I understand that, but I'm looking at it as a practical matter.

MR. JURELLER: So putting the facts aside, they're purported facts, as they're put in here, I don't know if you

want to get into the same argument with respect to the allegation against Themis, but it's a similar to same thing that --

THE COURT: See, you had two types of arguments. For example, on the first counts, the first two counts, your argument is that the statutes, New York and New Jersey statutes, on their face do not cover individual liability in this situation because, for example, Section 2-313 of New Jersey's Uniform Commercial Code, which is the section that underlies Count Two, says "(1) Express warranties by the seller are created as follows: (a) any affirmation of fact or promise made by the seller to the buyer which relates to the goods," et cetera, et cetera. And "seller" in that context, as applied to the facts here, can only mean the company and, therefore, no individual liability under that circumstance for these individual defendants.

MR. JURELLER: That's correct.

THE COURT: That's very different from the argument you're now making with respect to the other counts, which is, they haven't put in enough detail to plead certain --

MR. JURELLER: I think there are two parts to it, your Honor, and I took it the opposite way you took it. Yes, from a standpoint of the statute itself -- and it was just the way my notes were organized.

THE COURT: So what I want to know with respect to

Counts Three, Four, Five and Six -- is there anything you wanted to offer as a purely legal argument, as opposed to an insufficiency of the factual allegation type argument with respect to those counts?

MR. JURELLER: Right, let me -- you hit the first one and we've already put in our papers, and let me start with the GBL 349 just because going in order. It requires a misrepresentation by the seller. KFI was clearly the seller here, there's no plausible allegation that Themis or Mr. Aris were the seller, any actions that were done were in their positions as officers or directors of the company. So they are not the seller, and therefore we don't get that far.

In addition, with GBL 349, the cases that are cited by plaintiffs are clearly distinguishable. What they indicate, when you're going to hold an officer liable, is almost a specific -- specific either individual holding themselves out as liable, which is in the case of the Board of Managers of Mark Gardens Corp. where he individually signed the certification, or with respect to the Abrams case versus 21st Century Leisure Spa, where the officer actually violated the law himself, and that was a violation of they found a violation of executive law 63(12), I think it was.

So with respect to the GBL cause of action, we believe that, number one, they're not the seller; they can't become liable. Putting aside the fact that we don't think there are

misrepresentations in the first place, even if necessary. So, therefore, that one, we believe, should be knocked out.

With respect to the New Jersey Common Fraud Act, the case law that we have found indicates that individual liability under the CFA can only apply to a person who violates the CFA by means of an affirmative misrepresentation and a knowing omission, and they can only be liable for their own acts. Again, we don't believe what the plaintiffs pled meets that pleading requirement, and, therefore, doesn't go that far, to the officers and directors.

In addition, what the cases say is that individual cannot be liable under the CFA merely because of the act of the corporate entity. And, again, the seller in this circumstance is KFI. Assuming they did something wrong or not, but KFI is the seller, the seller is the party who is responsible here.

In instances where an officer/director is liable now, in every case that's been cited and every case that's been brought, the cases against the corporation and the officer, there's never been a case against one or the other, and it makes sense because, clearly, you're finding the company liable piercing the veil as well as the individual.

In the Allen case, what it found was that they found the individual officer liable because there were violations, again, similar to the GBL violations of specific New Jersey law. And in our case, there's no allegations that not only did

the corporation violate any specific New Jersey law but no allegations that these two individuals violated any law, they made no representations on their own, they made no representations, all acts were done through the corporate capacity.

So, based upon that, we believe that individual liability does not attach to the officers or directors, again, putting aside our arguments regarding the adequacy of the pleadings on the factual issues.

With respect to -- and, your Honor, I'm going to move forward unless you want to stop at something.

THE COURT: Go ahead.

MR. JURELLER: With respect to negligent misrepresentation claims, again, sticking to the legal aspects of this, under New York law -- and we argued under the New York law and New Jersey law just because that's where the claims are being brought, in both locations -- under New York law, it requires a special relationship between the buyer and the seller in order to find a negligent misrepresentation. And what we cited in furtherance of that proposition is the Suez Equity Investment L.P. case, which specifically indicates that that special relationship must exist between the parties.

Further, further to that, the New York Court of Appeals has stated that a simple commercial contract relationship such as between a buyer and seller does not

constitute a special relationship necessary to support a negligent misrepresentation claim.

So under New York law, you need a special relationship and a commercial, simple commercial relationship, such as we have here, is not sufficient to get to that point. And that's putting aside the fact that it's between a seller and the buyer, there's no plausible allegation or ability to plead an allegation that the officer/director were the sellers in these instances here.

Under New Jersey law, to the extent it applies -- and I know plaintiffs have indicated they don't believe it applies but just to make everything complete here -- it's similar. You need to have an independent duty under a specific New Jersey statute in order to create negligent misrepresentation. There is nothing pled in the complaint that meets that pleading requirement.

And lastly -- hold on a second.

When the Court is looking at this, through the motion papers and opposition that have been submitted, the cases with respect to negligent misrepresentations cited by the plaintiffs are completely distinguishable. One case relates solely to jurisdiction rather than to liability. The other relates to prediscovery allegations, which we're beyond that here at this point, clearly.

Getting to the last claim for fraud, fraud, as we

know, under Twombly and Iqbal, you need to plead that with particularity, you need to show statements, everything that you and I talked about earlier when we were talking about the details and the facts. We do not believe that these claims reach those heightened pleading requirements, based upon the way that they are pled now. They don't say the who, what, when, where, although plaintiffs' counsel indicated who, what, where, they looked at it from the wrong perspective, in our mind.

In order to find the allegation -- remember, this is not KFI, this is not the company, and it keeps getting confused on the plaintiffs' side. This is not the company, this is the officers, directors, members. You need to find them liable, you need to find them, that they had the misrepresentations, omissions, made those statements, who, what, when, goes to them, when they did it, where they did it, how they did it. And we don't believe that the complaint as pled meets the heightened pleading requirements as against the individuals. And that relates to all four of those.

THE COURT: OK.

MR. JURELLER: Our last argument we put aside, but our argument was, your Honor, with respect to the fact that plaintiffs have now filed their proof of claim in bankruptcy court, and we talked about that earlier in the case so I'm not going to get into that yet unless your Honor so chooses but --

THE COURT: No, I am aware of that argument.

MR. JURELLER: I will sit for the moment unless you have some questions.

THE COURT: No. Thank you very much. Let me hear from plaintiffs' counsel.

MR. BURSOR: Your Honor, the six counts, they're the same six counts that your Honor found were sufficiently pleaded against the company. And so the --

THE COURT: Yes, but the point now is, assuming for the sake of argument, that your alter ego claims are out -- it doesn't matter whether they're in or out now; we're talking about individual claims. So the question before me is whether on these claims, whether these individual defendants or any of them took acts that personally directly violated those six provisions.

MR. BURSOR: Well, I think before you get to that inquiry, the alter ego analysis is sort of the threshold issue, because the point that I was going to start with is, all of these six claims have been adequately pleaded against KFI in the complaint that includes a subset of the allegations in this complaint. And this complaint alleges a veil-piercing/alter ego theory of liability against the individuals.

So if the veil-piercing/alter ego theory of liability survives, after looking at the Levesque case and the Hart case probably taking a look at the Morris case, if they're --

THE COURT: Yes, then it becomes an easy question. But now take it the other way. Assuming it doesn't survive, do any of these claims go through?

MR. BURSOR: And the other issue that I want to make on the veil-piercing is that the motion to dismiss did not challenge the adequacy of the veil-piercing allegations at all. The only argument the defendants raised with respect to the veil-piercing allegations in the motion to dismiss is that Judge Grossman had stayed the veil-piercing claims. And I think this Court has --

THE COURT: No, no, no, and they certainly raised the argument that it wasn't available independent of what Judge Grossman had said, because it would be covered by the bankruptcy stay, et cetera. And there were a bunch of arguments; there wasn't only the Judge Grossman argument.

MR. BURSOR: But, for example, there was no --

THE COURT: So let me ask you on that, because your adversary said here in this court today, that you had not adequately pled alter ego and veil-piercing, and are you saying that's not raised in their papers?

MR. BURSOR: I'm not saying that's not raised in the papers. If your Honor wants me to address it now, I'm happy to address it.

THE COURT: Well, I'm going to ask your adversary in a minute to tell me where it's raised in their papers because, I

agree, if it's not raised in their papers, it's too late to raise it in oral argument. If he shows me where it is raised in their papers, then I'll come back to you for a response, but let's go on.

MR. BURSOR: Fair enough.

So if the alter ego part gets dropped out, which hopefully it will not, from my perspective --

THE COURT: And you're right, if the alter ego is in, the individual liability, there's no issue there, it's in a rough way the functional equivalent of an aiding and abetting type theory. But let's now assume that the alter ego is out.

MR. BURSOR: OK. Your Honor, to the extent this is a motion to dismiss, and the argument is, the individuals can't be liable on Counts One or Two or for whatever count because they're not the sellers, because the company is the seller, therefore, if you don't have the alter ego, these individuals aren't the seller; your Honor, the complaint alleges that each of the defendants is the seller --

THE COURT: How can that be? Let's assume for the moment that this were summary judgment. No one, as far as I know, there's no evidence that any of the Kangadises went out to the street corner and said, please buy my olive oil when it was really pomace. It was all sold through the corporation that is in bankruptcy.

MR. BURSOR: Your Honor, that's correct. If the

standard is, did one of these people personally go out on the street corner and sell the olive oil, if that's the standard, then --

THE COURT: Why isn't that the standard except from a veil-piercing/alter ego point of view?

MR. BURSOR: Well, the reason it's not is because to the extent -- we've pled facts that establish the complete domination of the company by --

THE COURT: That's a variation on alter ego or veil-piercing.

MR. BURSOR: Now that the legal argument is being made that the veil-piercing theory of liability is unavailable for legal reasons relating to the absence of the corporation, but the same facts that show complete domination of the corporation show that these individuals were responsible for what was written on the tin, they were responsible for what was put into the tin, they were responsible for how that oil got in the tin and they were responsible for how that oil was sold in that tin.

So whether there's some technical legal argument that you can't have veil-piercing because of this bankruptcy for some reason, the facts -- and there's a lot of facts in this complaint --

THE COURT: Yes, OK, that's an interesting argument, and I think there's some plausibility to it. You're saying

that even if, for some technical reason, you can't bring in this action a claim against the corporation, namely, that it's in bankruptcy, that doesn't mean that you can't show that the individuals, through the device of this corporation or through the front of this corporation or through the intermediary actions of this corporation, were making misrepresentations to the public and, if you're right on that, again, that would cover all counts, including even Counts One and Two?

MR. BURSOR: And, your Honor, in our papers, both in our motion to dismiss opposition and in our class cert papers, we cited for each count examples of cases under New York and New Jersey law where the same cause of action was brought not only against the corporation but against an insider, an employee at the same time. So I think that we've made -- to the extent it's a legal argument, that you can't have a breach of warranty claim, for example, against an insider because the only warranting party is the corporation, I think we've refuted that with the citation -- for example, with respect to Counts One and Two, we cited the FlagHouse case --

THE COURT: OK, I get the idea.

So let me go back to your adversary just for a moment for two points. First, where in your papers, if anywhere, do you claim that they have not pled the elements of alter ego or veil-piercing liability as opposed to that they don't have a legal right to rely on that doctrine?

MR. JURELLER: Right, putting aside the whole legal part of that doctrine, first, we were relying upon Judge Grossman's decision, but we did, in our reply paper, in footnote number 5, indicate that, "Further although plaintiffs state that KFI was a sham, there are no plausible facts even asserted on this point as Capatriti was one of only many products admittedly sold by KFI." That's the extent we got into --

THE COURT: Yes, that's not sufficient to raise it.

MR. JURELLER: But it was also raised in their opposition papers. And as I believe we have a right to bring it up at this hearing today. As to the actual sufficiency of the pleadings, we did indicate it's not a sham, there's no proof that it's a sham, it's not plausible that it's a sham. And all of the things that are asserted in there go to that point.

The sham is --

THE COURT: I'm doubtful you've raised it, to be frank, but I will look at your briefs again.

MR. JURELLER: If you look at footnote 5 --

THE COURT: Look, as doubtless you will recall, from a long line of Second Circuit decisions, mostly emanating from Judge Friendly, generally regarded as the greatest judge that served in this court in the 1950s and '60s, that say putting something in a footnote is not something to preserve it for

purposes, in that case, of appeal, but the same would be applicable for a motion to dismiss.

However, I will look at all that, including the footnote 5, in what appears to be extremely small but legible type.

MR. JURELLER: And I apologize for that, your Honor.

THE COURT: But I'm going to interrupt and I will come back to you in a second.

MR. JURELLER: Oh.

THE COURT: Let me hear, assuming arguendo that the matter has been raised, although I am skeptical it has been, assuming arguendo, what would you respond?

MR. BURSOR: Your Honor, assuming arguendo it's been raised, what I would say is that the facts, the specific facts that we pled to support piercing the veil are that: Themis Kangadis submitted a false affidavit to this Court in April of 2013 -- I think it was April 2013 -- in a NOA action stating that he was the president of the company. He then testified he was not president of the company when I took his deposition, that's in the complaint. He testified he has no title. That Mr. Aris Kangadis, who was represented to this Court to be retired since 2005 and to have no role when they were trying to stop us from getting his deposition, in fact, he was the chief executive officer in the present company. His son posed as chief executive officer of the present company in a way that,

in our view, was perjurious. We've alleged the absence of any corporate formalities -- no shareholder meetings, no minutes, no shareholder votes. And that's based on the admissions of Aristidis Kangadis and Themis Kangadis, where they testify along the lines of, this is not General Motors, it's a family business, that's why we don't have shareholder meetings, never a vote, never a meeting, never a minute, somebody posing as the president who's not the president, somebody swearing under oath as president, diversion of resources.

They've got the CFO of the company, Dennis DeTore, on company time doing work for the other entities owned by the individuals. That's based on Mr. DeTore's testimony. They've got Themis Kangadis taking distributions from the company -- well, we don't know if they were distributions -- taking money from the company on 20 or more occasions, according to the CFO, Mr. DeTore. And according to Mr. Themis Kangadis himself, when asked, were these distributions, he says, I don't know; when asked, were they loans, he says, I don't know; when asked, what were they, his lawyer instructs him not to answer.

So we've shown a complete --

THE COURT: Is that right, by the way? On what ground did the lawyer instruct him not to answer?

MR. BURSOR: Relevance.

THE COURT: This was not brought to my attention.

MR. BURSOR: I wish I had brought it to your

attention. It was not brought to your attention.

THE COURT: Who was his lawyer?

MR. BURSOR: Mr. Arth, the partner from Fox Rothschild, the prior counsel.

THE COURT: Well, they're not before me now, but if the facts are as you just said, of course that would be not in compliance with the Federal Rules, and you cannot direct a witness not to answer on the grounds of relevance.

MR. BURSOR: Your Honor gave us in a good lesson in that a couple days after this happened, and so...

THE COURT: Anyway, it wasn't raised. But the relevant point is what he said about not knowing whether there were distributions, not knowing whether they were loans.

MR. BURSOR: Right. And we don't know what the amounts are.

And, your Honor, the other veil-piercing argument that goes straight to the heart of whether this is a real corporation or a sham, as we've alleged, is you have the testimony of a witness who was the director of quality assurance, supposedly the director of quality assurance at the company, who is testifying on several instances that she wanted to initiate recalls when she found out about the presence of the pomace and she's being overruled by a shareholder who has no formal title at the company, according to his own testimony, Themis Kangadis, no title at the company, is not the president,

is overruling the corporation's director of quality assurance and saying we cannot have a recall and, even before overruling her, is taking acts to conceal the presence of the pomace from her.

So it's not a traditional veil-piercing type allegation, because it's more specific to this case, but it's an allegation that shows the complete domination with respect to the acts at issue here because the person who supposedly was the employee of the corporation responsible for this area is being completely overruled by a shareholder, who has no title.

So we think that's more than sufficient to meet any standard for piercing the corporate veil.

THE COURT: All right. Let me go back to defense counsel.

MR. JURELLER: Your Honor, would you like me to address that?

THE COURT: Well --

MR. JURELLER: This is a closely-held company, run by -- owned by father, mother and son. There's nothing in here that I see for some sort of perjury that has been alleged that someone said something. It's a family company that's run as a family company.

Like most closely-held companies, it doesn't have all the shareholder meetings because it's three people, the father, the mother and the son.

There's no allegation with respect to the transfers that those transfers were in violation of any law, that they were not complying with any law. All it says is that there were transfers going to a shareholder who also runs the company. Whether his title is president, whether his title is CEO, the fact of the matter is, it's a family company, run by the son.

So we'll get into little details. Every small family-run business throughout the State of New York, and probably elsewhere, would fall into this, but there's nothing in here that shows any wrongdoing whatsoever or that it was used as a sham. This company was used for many other purposes. It had lots of products, it sold products, and there's nothing wrong evidenced by what was alleged here at all, I mean at all.

THE COURT: Let me ask you the other question that I wanted to ask you before. What do you say to their argument that even if, because of the bankruptcy, obviously, the corporation can't be held liable, and even assuming that the liability of the corporation, as a legal matter, cannot be the subject of claims made, on an alter ego basis or veil-piercing basis, against the individuals because of legal impediments under New York law or bankruptcy law, whatever, assuming all that, they say nevertheless that doesn't mean that you can't bring an action against an individual to show that he intentionally caused a fraud to be perpetrated using as his

vehicle a corporate veil, that those claims may or may not be proveable, but assuming they have been properly alleged, if you can show that Joe Smith decided to defraud a group of customers and in order to undertake that fraud he caused a company that he controlled as a factual matter to make the misrepresentations that he wanted made, why is that precluded?

MR. JURELLER: Well, your Honor, I think the assumptions are extremely big assumptions. You're basically saying if we disregard the corporation, under New York law and the protections that you have, if we then disregard the law on piercing the veil, which requires you to get -- it presupposes the corporation being liable, if you disregard the entire bankruptcy court and the fact that you have all those rights to go after the individual in bankruptcy, it's there --

THE COURT: Their argument, you're saying, renders those provisions, assuming you're right --

MR. JURELLER: You are throwing them out.

THE COURT: -- a nullity? I do think that's the problem. They say there are cases where it's been allowed.

MR. JURELLER: But, again, the fourth step, in order to get to this, you now need to pass that fourth step also. You need to now show that that liability reaches that officer, director, principal, member, under the particular statutes in question, the GBL 349, the New Jersey Consumer Fraud Act, the fraud and negligent misrepresentations under the heightened

pleading standards, you need to get that point. You can't just say, oh, they filed bankruptcy, we think it's a fraud, so we're just going to disregard all of the law and we're going to hold you liable for the corporate acts because these are all corporate acts.

Everything was sold under KFI, everything was marketed, everything was done under KFI, all of the acts that were alleged here were done through KFI. And it would be a complete disregard --

THE COURT: Well, what I am unclear on -- and I have to go back to the briefs on this, I don't have a memory on this -- I thought I heard plaintiff saying -- and maybe I'll put this question to plaintiffs' counsel first -- are there cases under New York or New Jersey law or both, under these particular sections, where individuals have been held liable for violations of those sections -- I'm talking about Counts One and Two -- even though the seller in the direct sense was their company?

MR. BURSOR: I'm sorry, the last part?

THE COURT: In other words, are there cases, under either of those laws, where company X made a misrepresentation to consumer Y, and not just the company but the individual or just the individual was held liable? This has nothing to do with bankruptcy and has nothing to do with any of the other doctrines we have been discussing. I just want to know if

there are cases under the law.

MR. BURSOR: The answer is, there are cases under New York and New Jersey law that have certainly let claims like those pass the motion-to-dismiss stage, and I think some of them even pass the summary judgment stage.

THE COURT: Despite an argument that individuals are not covered?

MR. BURSOR: Yes. And with respect --

THE COURT: So let's put this to the test. Give me what you would consider maybe the two best cases.

MR. BURSOR: Well, I don't know which ones are the best, but with respect to the warranty claims under New Jersey law, we cite the FlagHouse case at page --

THE COURT: Let's pull that up.

THE LAW CLERK: It's 528 --

THE COURT: See if you can print that out while we continue.

MR. BURSOR: And with respect to the GBL claim, GBL 349, we cited the Board of Managers of Mark Garden Condo. It's 2008, WL 4058677.

THE COURT: OK. We're going to pull up those two cases. Because we've gone two hours and I have a lunch I have to go to at 1:00 o'clock -- it's now 12:30 -- I want to shift to something totally different while we pull up those two cases and we're going to come back --

MR. BURSOR: Your Honor, just on the GBL one, actually, the better case is the second one we cite, it's People by Abrams because it actually has a finding of liability.

THE COURT: OK, we will pull up that one too. What's the cite on that?

MR. BURSOR: It's 583 N.Y.S.2d 726. And that's a case where the there was a judgment entered into government enforcement action.

THE COURT: We'll take a look at it. So I am going to put the argument on both sides on hold while we get to those cases and shift to something totally different, which is class certification.

Assuming the case survives in whole or in part, you've already briefed the class certification, I will need to decide that then as well, and there's only one point, because now we are running out of time, that I wanted argument on. This arises from a decision that Judge Koeltl made where he in a case denied class certification because the law of fraud varies so much from state to state.

I'm not totally sure I agree with that, but even if that were so, wouldn't that argue, at most, for limiting the class maybe to New Jersey and New York, not to denying certification altogether? Because certainly both parties have briefed at great length what New York and New Jersey law is,

and I have a very good feel for it as a result and know whether they were sufficiently similar or dissimilar as to warrant class certification.

So let me hear, I guess, first from defense counsel opposing class certification and then from plaintiffs' counsel.

MR. JURELLER: Well, your Honor, just to clarify what you're asking --

THE COURT: I'm asking, if the case is not dismissed in its entirety, so I have to reach then the question of class certification, with respect to the argument that the class certification should be denied because the law of fraud varies -- and all these counts sound in effect like fraud in one sense or another -- tremendously from state to state and therefore a nationwide class would be inappropriate, doesn't that at most argue that I should limit the class to New Jersey and New York, not that I should eliminate the class altogether? That's the question, the narrow question, that I wanted to address. There are a hundred other questions under class certification you both briefed, but we're not going to argue them today.

MR. JURELLER: Well, your Honor, I hope you never get to that point.

THE COURT: I understand.

MR. JURELLER: But if you were to limit it to New York and New Jersey, clearly that affects the commonality of the

argument. However, I think a couple things: You're now bringing class actions in two states when we have sales that the plaintiffs have shown are in 50 states, and how that affects parties --

THE COURT: One of the reasons I'm raising this is because it's not clear to me that you would want -- if the choice were a class action where the class was New York and New Jersey or a class action where the class was nationwide, it's not clear to me -- this is your decision, not mine -- whether you would prefer a class action limited to two states, given your nationwide sales. You might prefer to have this resolved across the board one way or the other.

MR. JURELLER: Well, as I said, I think it clearly changes the arguments. Obviously, we don't have that issue with respect to the fact that there's -- there was 50 states' fraud laws that we had to deal with.

I think the only answer to that is, even if you were to look to both states -- so if you were to look at the reports, it appears that the majority of sales were in New York, New Jersey and that particular area -- however, there were substantial sales outside of New York and New Jersey -- you still have -- even if you were to limit it just to the fraud statute of those two particular states, all of the other problems, concerns that you had raised in your prior certification are still there, all of them, because you have in

New York, where the majority of the sales are, you still have the significant, significant -- and impossible, in our opinion -- ascertainability issue in New York. So I don't think it takes away your burden of having to look at those other issues and decide those other points because of the nature of the sale.

So the plaintiffs were able to identify --

THE COURT: So I understand that argument as to why it should not be a more limited class of New Jersey and New York. However -- and you don't have to give me an answer on this today if you want to consult with your client -- in the hypothetical possibility that you had to choose between a class limited to New York and New Jersey or a nationwide class -- I may not come out on that at all, I may agree with you that there should not be any class, I may not even get to class action, there are many, many hypothetical possibilities, but I want to get everything decided in the next few days. So what I need to know from you and your client is, in that possibility that the choice is between a nationwide class and a class limited to New York and New Jersey, which would you prefer? You don't have to --

MR. JURELLER: It's like dropping a rock on one foot versus the other.

THE COURT: I understand. But I can see reasons why, if you were put to that Hobson's choice, you might prefer one

or you might prefer the other. So you can let me know, by letter later today, which you would prefer.

MR. JURELLER: The only thing I would say, your Honor, is, that's a very difficult question because we believe, even putting that part aside, we believe you don't get that far with our other arguments --

THE COURT: I may not get that far. This is purely because I am determined, for your sakes as well as mine, to get these motions all determined very promptly. So I don't want to have to keep going back and say, well, now that I have reached this point, what do you think? I may never reach this point but I would like to know the answer later today.

MR. JURELLER: We will get that response to you. If I may ask, if I can get it to you tomorrow? Because I have a medical appointment unfortunately --

THE COURT: Of course, tomorrow is fine. By 5:00 p.m.

MR. JURELLER: I say that because I don't want to ignore -- we think that the rest of the arguments are actually stronger than that one.

THE COURT: You've fully preserved it.

MR. JURELLER: Thank you very much.

THE COURT: Go ahead.

MR. BURSOR: So the answer to your Honor's question was, yes, if you find a 50-state problem, it's not grounds for denying cert, it's grounds for certifying the narrow geographic

class, but I don't think that's what should happen here.

THE COURT: For you, it's easy; you'd rather have half a loaf than no loaf but you prefer the whole loaf.

MR. BURSOR: So courts have taken two approaches to this choice-of-law issue with class cert. There's one -- and this wasn't really briefed, so we didn't put these authorities in, but I can tell you I've briefed them many times. One train of thought is -- and you see this in many decisions -- 50 states, that you can't possibly be certified because of the differences, with no real analysis in the decision.

The other and better way to approach it at class cert is to go through a choice-of-law analysis to determine whether there would be any requirement to apply the laws from outside the forum state. That's an analysis your Honor did in the KFI action and concluded that New York law applies. And, generally, at class certification courts that do the choice-of-law analysis impose the burden to establish that a foreign jurisdiction's law should apply on the party asserting that the foreign jurisdiction --

THE COURT: I must say that is the way I have gone in some prior cases. Judge Koeltl is a very excellent judge and his opinion gave me a little pause. I agree with you this was not really briefed, but I have familiarity with the arguments, so I will take it under advisement.

Let's go back. I now have those three cases. So now

tell me again what you thought was the best of all.

MR. BURSOR: Well, on the GBL, it was the one, People of New York through Mr. Abrams, I think, was --

THE COURT: Yes, right. Let me just look at that. This is a decision of the lower court, Supreme Court of New York, which, to the endless confusion of all law students, is actually the trial court of New York despite its name, and let me see where it is.

MR. BURSOR: And, your Honor, I don't have a copy with me, but I'm looking at what we said in our brief. And it says that a petition was granted, petition for judgment and government enforcement action under GBL 349, against both an individual defendant who was the president of the company and against the company itself. And we cited that in support of the assertion that New York courts permit claims for violation of 349 to proceed against both the employee and the --

THE COURT: I'm reading just the squib -- I have to read this more carefully -- but the squib says, "State-brought action against health club and its manager alleging fraud after a health club unexpectedly closed. The Supreme Court of New York County, Greenfield, J., held that: (1) manager could be held personally responsible for club members' losses despite even absent intent to defraud; and (2) club manager could be enjoined from engaging in any illegal or fraudulent acts or from entering into any contracts or renewing existing

contracts."

The latter holding seems to me to be irrelevant. Injunction of the law can go much broader than what liability might attach, but the first holding -- and indeed it was a holding -- to pay restitutions to the members of this health club, the respondents did not deny any of petitioner's allegation. Their claim was that it was the individual's fault, their now former manager at the point in time where this occurred.

But he argued -- his name was Verderama -- that he cannot be held personally liable because he did not personally benefit from the alleged fraud. That's a different kind of argument.

And then there was an argument about the merits of whether there was any fraud.

None of them look to me like the court addressed the issue we're talking about here. I know you don't have it in front of you. It is true that a judgment was entered but it doesn't appear that the issue was raised. So he didn't raise the issue, the court had no reason to address it.

MR. BURSOR: Well, I thought the issue was, can liability attach to an individual?

THE COURT: Right, but he didn't raise that. He, for whatever reason, at the decision of his lawyer maybe, wittingly or unwittingly, didn't raise that issue. His contention was

all about the facts that he personally didn't do anything wrong.

MR. BURSOR: That's the same argument being made --

THE COURT: No, no, no, it's different. He's saying he wasn't liable, factually liable, that he didn't commit any fraud, and the Court held, yes, you did. I didn't read it all into the record, but if you look at it, he recites all the things he did and that in fact his contention, more particularly, was that what he was doing was totally proper, whatever the club may have done, and they say, no, no, no, he did a lot of improper things. That's from a quick reading of it.

But he never said, I can't, under the statute, be held liable because it only applies to the corporation. And if he didn't raise the issue, I don't see how you can see this -- it is, at best, very modest authority.

MR. BURSOR: I'm not sure, your Honor. It depends on what the question is. If the question is, can an individual be held liable under 349, certainly it's authority for that --

THE COURT: Well, if the issue is not raised before the court, unless it's jurisdictional, the court has no obligation to raise it sua sponte and arguably it should not even be raised sua sponte.

All right, we are running out of time. I'm going to conclude this by saying as follows: I will get you a

bottom-line ruling, with opinion to follow, at no later than Wednesday of next week. I hope to do actually better than that, but Wednesday at 5:00 p.m. at the latest.

If for any reason I decide to convert any portion of the motion into summary judgment, I will set a very quick schedule and I will not require either side to put into 56.1 statements but, rather, simply to give any me additional facts that they think bear on whether there is a genuine issue for the jury under the particular claims that I will address. I'm not sure I'm going to go that route at all, but if I do go that route, I will specify quite specifically what I want and what I don't want if we have summary judgment so that we can put that on a very quick schedule too. It will be narrow.

Independent of that, I did ask defense counsel to tell me today whether they intended to bring a summary judgment motion and, if so, on what grounds. So let me hear from defense counsel.

MR. JURELLER: Your Honor, obviously it depends on what happens here with respect to these motions.

THE COURT: Of course.

MR. JURELLER: But as you and I discussed earlier in the argument, back about an hour or so ago, we do believe we have grounds for summary judgment.

THE COURT: Yes. Would it be on anything other than the kinds of things we were discussing?

MR. JURELLER: It will be mostly on the things we discussed because I think those are the pertinent issues. If piercing the veil is left, I think we still have summary judgment on the piercing the veil. If you get to direct claims, if any of those are still out as to piercing the veil -- excuse me, we have a summary judgment on those claims too because the fact of the matter is, discovery is done and we believe, if you're basing it on the pleadings and we need -- I think we have those arguments there. So we would like to move for summary judgment.

THE COURT: OK. I think then, given that, I'm going to change my mind about how I'm going to handle this. I will address this motion strictly as a motion to dismiss. I will decide it on that basis by next Wednesday.

And then I agree that that may still open the door, depending on how I come out, to a summary judgment motion. I think this argument today shows that there will be a good-faith basis for bringing a summary judgment.

MR. JURELLER: Thank you, your Honor.

THE COURT: And then your papers would be due on September 30th.

MR. JURELLER: Could I ask that it get moved either one or two days from there? The only reason is, I'm coming back from a long-planned trip on that Monday, which is the 29th. If I could even the 1st or the 2nd?

THE COURT: Yes. But of course remember, the one day that's not going to change is the trial, starting November the 3rd. So in some ways you're hurting yourself by further delay but --

MR. JURELLER: One more day then would be fine.

THE COURT: OK, that's fine.

MR. JURELLER: Let me preface that: If we're not going to be able to get it done in time, we will have it in on the 30th, but if -- one day is going to affect that, but if one day is not going to affect the ultimate motion schedule, that's fine.

THE COURT: Well, I'm going to give them probably two weeks to respond, so let's assume it's October 2nd. So moving papers on October 2nd, and reply papers, answering papers, on October 16th.

Now, my strong suggestion to you is you put in reply -- I don't need oral argument on this -- you put in reply papers in less than a week. I would normally give you a week, but my suggestion is that you put in your reply papers, say, on October 21st.

MR. JURELLER: That's fine with us, your Honor.

THE COURT: Pardon?

MR. JURELLER: We're open to whatever the Court suggests.

THE COURT: OK. Then I will decide that motion on

October 24th.

MR. JURELLER: With no oral argument, correct?

THE COURT: No oral argument.

Now, in terms of -- the one thing I will change is, in terms of the trial, I normally require motions in limine to be exchanged between the parties two weeks before the trial and then given to me one week before the trial, but instead, any motions in limine -- which, by the way, are totally unnecessary in most cases -- you can raise these orally at the time through an objection when the evidence is first presented and sort it out there. My experience is, most motions in limine I resolve by saying I can't resolve this until I hear the evidence in the case, so it doesn't do much good.

But nevertheless, if there are motions in limine, the moving papers don't have to be served until October 28th. The answering papers don't have to be served until October 31st. No reply papers, and I will deal with them before we swear in the jury on November 3rd, and I have flag for you in advance, that the chances are overwhelmingly that I will deal with them by saying we will deal with that as the evidence is presented. So you will have wasted your time but, heck, what the hell.

First of all, as you are aware, there's actually no provision in federal law that requires motions in limine or even authorizes motions in limine; they are purely a judge-created motion.

And second of all, the failure to file a motion in limine does not waive any right whatsoever. So if the motion in limine, for example, is no one should refer to X, you can raise that even before opening argument and we will discuss it then or you can raise it with the first witness, just ask the question and you ask for a sidebar. So motions in limine are usually a waste of time.

Anything else we need to take up today?

MR. BURSOR: Your Honor, there are two things. One is, there was a case that came down from the Seventh Circuit on class certification after our briefing. I'd just like to provide the Court with a citation to that.

THE COURT: Sure.

MR. BURSOR: It's Suchanek versus Sturm Foods, Inc., it's 2014 WL 4116493, it's Seventh Circuit August --

THE LAW CLERK: Say that one more time. Sorry. The Westlaw citation.

MR. BURSOR: 2014 WL 4116493.

THE LAW CLERK: Thank you.

MR. BURSOR: Seventh Circuit, August 22nd, and it involved a GBL 349 claim on a mislabeled product. So that might be of interest to the Court.

The second --

THE COURT: Who's the panel? This is the Seventh Circuit?

MR. BURSOR: Seventh.

THE COURT: Yes, Seventh? All judges are equal, of course, but Judge Posner and Judge Easterbrook are particularly --

MR. BURSOR: They're more equal.

THE COURT: Well, someone might claim that, right.

MR. BURSOR: It was Chief Judge Wood and Judges --

THE COURT: Diane Wood, very famous judge, OK.

MR. BURSOR: And Judges Cudahy and Rovner were on the --

THE COURT: Very good. Thank you.

MR. BURSOR: The second issue we had was, we had a discovery issue raised by letter and your Honor deferred it till today's hearing.

THE COURT: I forgot that. Yes, remind me of what that was.

MR. BURSOR: Well, your Honor, there are claims in the case -- we sought financial discovery from each of the defendants. And the reason is because there's a claim for punitive damage in the case and New York law requires consideration of the financial condition of the defendant as a part of the punitive damages analysis. So my concern is --

THE COURT: Yes, that's a fair concern. But you should be aware that I always bifurcate -- I ask the jury in their initial verdict whether they wish to have punitive

damages, award punitive damages. If the answer is no, we don't have to reach this kind of issue. If the issue is yes, then I call the jury back to determine punitive damages but only after they have been presented with the evidence bearing just on punitive damages.

So I think that you would be at that point clearly entitled to that discovery, but that we don't need to get into that now. I think the way to handle that is, I think we will have, after I decide this motion and we get -- assuming the case goes forward, we have a few days of testimony, it will be much clearer to me, as well as to counsel, whether punitive damages claim is even going to survive. And if it is, then I will arrange, maybe over a weekend or by papers, through document production, to have that supplied to you before we reach the end of the case, so that you will have that information. But I think it's appropriate to put it off till then.

I put defendants on notice, therefore, that they may have to get this information gathered even while they're in the middle of trial, which is a burden. If they would prefer to do it now, of course, I can order it now, but I suspect they might want to prefer to wait because it may become moot.

MR. JURELLER: We will wait, your Honor. Thank you.

THE COURT: Very good.

MR. BURSOR: Your Honor, can I ask you a question

about that? My only question was, does your Honor excuse the jury for some period of time and then bring them back?

THE COURT: Well, yes, because they have to decide the verdict on the -- so here's the way it works: I give the jury my instructions of law. And I say to them, on punitive damages, here's the standard for punitive damages, to determine whether or not you want to award punitive damages, not how much, but which doesn't, for example, refer to the financial situation of any given party, and if you find liability on any claim, check the box that says on this claim we want to award punitive damages we do not want to award punitive damages.

So they're then out for two hours or 20 hours or two weeks, deciding the basic issues in the case.

MR. BURSOR: Right.

THE COURT: That gives us lots of time to prepare for any punitive damages.

If they say, yes, we want punitive damages, then we call them back. Usually it can be done within a half day of evidence, but every case is different. We give them whatever evidence is relevant to the amount of punitive damages, you know, some of that evidence they've already heard but some of it, like on financial stuff they haven't heard, and then they go back out and decide that last question.

So we don't know how long they will be out. It can be a little or lot in a case like this. I think it seems

self-evident that they would be out at least a half day, maybe two days.

MR. BURSOR: So if the box is checked, yes, we want to do punitive damages, we then immediately go back into court and begin the punitive damages phase of the trial?

THE COURT: Once they come back with their verdict, yes.

MR. BURSOR: OK. So that was my concern --

THE COURT: There's no further delay, but that's why you have to get the stuff before then, but I don't think you have to get it now. OK?

MR. JURELLER: Just two brief points. You had asked if there was anything further.

One thing I didn't want to gloss over: You had asked about the three best cases that plaintiff had. We actually addressed each of those on pages 7 and 8 of our reply brief. I wanted to point that out because I think all of them are not on point or different in some way.

I also wanted to similarly address a recent decision on the class certification. We had put it into our reply brief because the class cert was brought up in the opposition, but it wasn't in the certification briefing because it came after the fact, and that's the EQT Production versus Adair case in the Fourth Circuit, the Westlaw is 214 WL 4070457. So just for completeness, I just want to bring that to the Court's

attention as well.

THE COURT: Yes. I'll ask you the same question, though all judges are equal: Who wrote that opinion?

MR. JURELLER: It looks like Diaz. Diaz; is that right? Court of Appeals, Diaz, Second Circuit judge held --

THE COURT: And the panel was?

MR. JURELLER: Let me see here. I'm sorry.

THE COURT: Well --

MR. JURELLER: It's Wilkinson, Keenan and Diaz.

THE COURT: I'm sorry?

MR. JURELLER: It's Wilkinson, Keenan and Diaz that appeared on that.

THE COURT: Judge Wilkinson? They're all great judges. All judges are great.

MR. JURELLER: Good to hear.

THE COURT: But Judge Wilkinson is again a very good judge.

Very good. Thank you.

MR. JURELLER: Thank you, your Honor.

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